In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-567

AUBREY WAYNE BEAUCHAMP, PETITIONER

v.

UNITED STATES OF AMERICA

No. 72-5528

TOM CORBETT, PAUL WESCOTT KLINE AND ROYCE LEE BRINSON, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES

STATEMENT

After a jury trial in the United States District Court for the Southern District of Florida, petitioners and a co-defendant were convicted of conspiracy to import marihuana into the United States, in violation of 21 U.S.C. (1964 ed.) 176a. Petitioner Corbett was sentenced to imprisonment for five years, subject to

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the provisions of 18 U.S.C. 4208(a)(2). The other petitioners were each sentenced to imprisonment for six years (Sent. Hear. 12, 5, 6, 32).[1] The court of appeals affirmed (Pets. App. A).

1. Co-conspirator Rosenstrauch testified for the government that about the first week of January 1971, at the solicitation of co-defendant Milisci,[2] he put up $3,000 in a venture whose exact nature was not then disclosed to him (Tr. 35–37). Shortly thereafter he was introduced to petitioner Kline and a man who was to be captain of a chartered vessel which would pick up marihuana in Jamaica and bring it to the United States. Arrangements were made for its reception on the Florida coast (Tr. 38–46). Later in the month, Rosenstrauch learned from one Prevette, who had arranged for chartering the boat, that it had sunk and that the parties who had been operating it had returned to the United States. Milisci and Rosenstrauch set about trying to find another boat (Tr. 46–49).

At Prevette's request, Narcotics Agent Roque, operating under an assumed name, agreed to furnish Milisci, Brinson and Prevette a boat at Grand Cayman Island to bring in approximately a ton and a half of marihuana from Jamaica (Tr. 204–211). Brinson introduced Roque to Corbett, Beauchamp and Kline[3] at Miami International Airport on February 13, 1971; they accompanied him to Grand Cayman to pick up the boat. During the flight Beauchamp told Roque that

[1] "Sent. Hear." refers to the hearing on sentencing and "Tr." to the trial transcript, which are being lodged with the Clerk of this Court.

[2] Milisci appealed, but is not a petitioner herein.

[3] The latter two were using assumed names.

the people on the boat would communicate with those at the pickup area in Jamaica by walkie-talkie, and that he had charted their course and had marked the spot for the pickup (Tr. 212–213).

After their arrival in Grand Cayman, Roque introduced Beauchamp to one Bethel, who was to be captain of the vessel used. Beauchamp and Bethel charted the course to be followed, discussed the amount of fuel needed, and made plans for the pickup (Tr. 213–215, 300–301). That evening, Roque discussed with Beauchamp and Kline their plans for loading the marihuana by use of canoes. Roque mentioned patrol boats, and Beauchamp said that on a prior trip the natives had loaded a ton of marihuana in twenty-five minutes (Tr. 216–217).

On the following afternoon, Corbett, Beauchamp, Kline and Bethel left for Jamaica (Tr. 218–219). Because he was ill, Corbett was in his bunk most of the trip. He told Bethel that he had been on drugs for the past four months, had been unable to work, and his earnings on this trip would help to get him back on his feet (Tr. 311–312). The boat arrived around midnight at the pickup point, but attempts to communicate with the party on shore were unsuccessful because the walkie-talkie was broken. The boat cruised the pickup area for four hours, until rising surf caused it to run aground. After getting it free, the four men returned to Grand Cayman (Tr. 313–319, 66).[4]

[4] Roque later met Rosenstrauch and Brinson at Prevette's apartment. They reported that they had had the marihuana ready to load at Jamaica, but had not seen the boat (Tr. 220–222).

2. A motion for mistrial was made on the ground that occurrences before February 11, 1971, involved another conspiracy and testimony relating thereto was inadmissible (Tr. 410–411). This motion was denied (Tr. 425–426, 462). The court, however, instructed the jury that Prevette's testimony, which it regarded as not particularly coherent or extensive, should be disregarded (Tr. 467–468).

Petitioner Beauchamp was the only defendant to testify. He explained that he went along on the trip only as a crew member (Tr. 484–486). He stated that after the boat was on its way to Jamaica, Bethel told him that the purpose of the trip was to pick up a half million dollars worth of "stuff" (Tr. 507). Unable to escape, he had removed a part from the walkie-talkie (Tr. 508–511). After the boat grounded, according to his account, he was able to free it and they headed back to Grand Cayman (Tr. 517–520).

ARGUMENT

1. The court of appeals correctly concluded that in this case the claim of entrapment as a matter of law "cannot be seriously made" (Pet. App. 9).[5] The law is clear that when government agents "merely afford opportunities or facilities for the commission of the offense" to persons ready and willing to engage in the unlawful conduct, there is no entrapment. *Sherman* v. *United States*, 356 U.S. 369, 372; *Sorrells* v. *United States*, 287 U.S. 435, 441–442; *Lewis* v. *United States*, 385 U.S. 206, 209. The boat which petitioners unwit-

[5] References to the opinion of the court of appeals are to the Appendix in the printed petition of Beauchamp, No. 72-567.

tingly engaged through a government agent was just such a facility. Rather than constituting entrapment as a matter of law, the evidence summarized above would have justified the court in refusing to give an entrapment instruction. *Lopez* v. *United States*, 373 U.S. 427, 434–435. In fact, the issue was submitted to the jury on an instruction to which there has been no exception.[6]

2. Petitioner Beauchamp contends that he was improperly deprived of his rights because his trial counsel was not permitted to comment to the jury regarding the failure of the other defendants to take the witness stand. This claim is not well taken. The trial court carefully and properly instructed the jury regarding the right of a defendant to testify or not (Tr. 657–659). As the court below put it (Pet. App. 8–9):

> As we read the record, following considerable colloquy, the trial court's limitations made it permissible for counsel to argue to the jury that Beauchamp testified as a witness and they were to be the judges of his demeanor and the truth or falsity of his testimony as a witness. The court merely prohibited counsel from drawing any contrast between Beauchamp's giving

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[6] *United States* v. *Russell*, 459 F. 2d 671 (C.A. 9), certiorari granted, October 16, 1972, No. 71–1585; *United States* v. *Bueno*, 447 F. 2d 903, 905–906 (C.A. 5); and *United States* v. *Chisum*, 312 F. Supp. 1307 (C.D. Cal.), relied upon by petitioners in No. 72–5528, are inapposite. In all of these cases the contraband upon which the charges were based, or an ingredient of the contraband, was furnished by the government. Whatever may be the determination of the Court in *Russell*, it would furnish no basis for reversal of the convictions here. Accordingly, there is no reason to defer disposition of this case until *Russell* is decided.

testimony and the other defendants failing to do so. We conclude that this fully meets the requirements that the rights of the co-defendants must be balanced by the court in such a situation as this.[7]

3. The record does not support the contention of petitioners Corbett, Kline and Brinson that there were two separate conspiracies. On the contrary, Rosenstrauch's testimony was that co-defendant Milisci asked him in early January 1971 to invest a substantial sum to charter a boat to bring a large quantity of marihuana from Jamaica to the United States. In the course of events, Rosenstrauch met Kline and Prevette, the boat was chartered, but then sank. Rosenstrauch and Milisci therefore tried to procure another vessel, which was offered to them on favorable terms through the involvement of Roque (Tr. 35–49).

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[7] Petitioner Corbett alleges that the decision of the other defendants to rely on the defense of entrapment forced him to abandon his plea of not guilty and plead entrapment (Pet. No. 72–5528, 14–15). In fact, there was no abandonment of plea, and his contention that he was not involved in the conspiracy was argued forcefully to the jury (Tr. 631, 635–636).

Petitioners Corbett, Kline and Brinson contend that the district court abused its discretion in refusing to grant a severence in light of petitioner Beauchamp's decision to testify, since his testimony constituted a confession which they could not rebut without testifying themselves, and concerning which cross-examination by their attorneys would have elicited perjured testimony in violation of professional ethics. In fact, the testimony was not a confession but a total denial of participation in any conspiracy, which, if believed, tended primarily to incriminate Bethel, Roque, and Milisci, rather than petitioners herein. The contention that fear of eliciting perjured testimony prevented cross-examination is ingenious, but hardly excuses the failure to cross-examine a witness whose testimony was allegedly damaging to petitioners' defense.

That the indictment limited the time period of the conspiracy charged did not restrict the jury from considering the above evidence, including events before that period, which was relevant to show intent, purpose or a common scheme. Moreover, this evidence was highly material to rebut the claim of entrapment, which necessarily and properly makes the defendant subject to an "appropriate and searching inquiry into his own conduct and predisposition" as bearing on the claim of innocence. *Sherman* v. *United States*, 356 U.S. at 373; *Sorrells* v. *United States*, 287 U.S. at 451.

4. The district court imposed sentences of six years' imprisonment on all petitioners except Corbett, thus conclusively showing that the length of sentence which it felt was suitable in the circumstances was not determined by the minimum fixed by 21 U.S.C. (1964 ed.) 176a. Accordingly, a decision by this Court reviewing *United States* v. *Bradley*, 455 F.2d 1181 (C.A. 1), certiorari granted, 407 U.S. 908, cannot affect the length of the sentences imposed on these petitioners. If the Court should determine in *Bradley* that persons sentenced under the old statute should in fact have been sentenced under the new statute and thus are eligible for probation or parole, that determination would not require resentencing in this case.

On the other hand, petitioner Corbett was sentenced to the mandatory minimum sentence under Section 176a, with eligibility for parole pursuant to 18 U.S.C. 4208 (a)(2).[8] This sentence thus presents the questions in-

[8] It is our view, as set out more fully in our brief in *Bradley*, that parole is not available to persons convicted of narcotics offenses committed before the effective date of the Comprehensive Drug Abuse Control Act.

volved in *Bradley* and therefore we believe it appropriate for this Court to defer disposition of Corbett's petition until *Bradley* is decided.

CONCLUSION

It is therefore respectfully submitted that the Court should deny certiorari as to all petitioners except Corbett. Since the propriety of the sentence imposed upon him may depend upon the decision to be made in *Bradley* v. *United States*, his petition should be held until such determination is made.

ERWIN N. GRISWOLD,
Solicitor General.

NOVEMBER 1972.

U.S. GOVERNMENT PRINTING OFFICE: 1972